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CARUCEL INVESTMENTS, L.P.

17 **UNITED STATES DISTRICT COURT**
18 **SOUTHERN DISTRICT OF CALIFORNIA**

19 CARUCEL INVESTMENTS, L.P., a
20 Delaware limited partnership,

21 Plaintiff,

22 v.

23 NOVATEL WIRELESS, INC., a
24 Delaware corporation; VERIZON
COMMUNICATIONS INC., a
25 Delaware corporation; and CELLCO
26 PARTNERSHIP d/b/a VERIZON
WIRELESS,

27 Defendants.
28

Case No. 16-cv-0118-H-KSC

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION TO
STRIKE PORTIONS OF THE
SUPPLEMENTAL REPORT OF
PLAINTIFF'S DAMAGES
EXPERT PATRICK KENNEDY**

I. INTRODUCTION

Plaintiff Carucel requests that the Court deny Defendants' motion to strike portions of the supplemental report of Plaintiff's damages expert Patrick Kennedy ("Motion") (Dkt. 169). Defendants assert that portions of the Kennedy Supplemental Report should be struck (a) for "attempting to erect an entirely new damages framework with a different hypothetical negotiation" and (b) as an "unauthorized reply report." *See* Dkt. 171, at 7 & 9.

As an initial matter, by law a hypothetical negotiation is specific to the parties and acts of infringement involved. As such, Carucel's hypothetical negotiation with Verizon would be different from Carucel's negotiation with Novatel. Defendants also mischaracterize the nature of the supplemental expert report and downplay their own responsibility for making the supplement necessary. Verizon refused to produce revenue and cost information regarding data service plans associated with the accused devices that deprived Dr. Kennedy of the information needed to give an expert opinion on damages attributable to Verizon. The delayed discovery showed that Verizon derived by far most of its MiFi-related revenue came from data usage plans. Dr. Kennedy provided exactly the type of supplement he reserved the right to provide in his original report and deposition, a report that could not have been produced until he received the data service information. There is no good reason to strike his supplemental report.

Finally, Defendants accuse Dr. Kennedy of going too far by addressing criticisms leveled by Defendants subsequent to Dr. Kennedy's initial report. But Dr. Kennedy followed the same methodology in his supplemental report and that section merely supports his supplemental opinion. An expert is not only permitted to address new information in a subsequent report, but should take into account all known information related to a report when the report is written. The entire report is proper, and none of it should be stricken.

II. FACTUAL BACKGROUND

The accused products, or “MiFi” devices, are small portable devices that wirelessly connect mobile user devices like laptop computers and tablets to cellular phone networks. Novatel sells the accused MiFi products to internet service providers, including Verizon. Verizon sells MiFis with data service plans—the MiFis cannot operate without the service plan.

During discovery, Verizon produced information related to the sale of MiFi units without disclosing the associated data service plans bundled with those units. *See* Declaration of Michael Lindsey in Support of Opposition to Defendants’ Motion to Strike Portions of the Supplemental Report of Plaintiff’s Damages Expert Patrick Kennedy [“Lindsey Decl.”], ¶ 2.) Carucel served interrogatories seeking discovery on wireless data plans sold together with the accused devices. Lindsey Decl., ¶ 3 & Ex. A. Carucel also served an amended 30(b)(6) notice on Verizon adding topics related to wireless services bundled with MiFi devices, and also served a request for document production seeking documents related to Verizon’s wireless data service plans associated with MiFi devices on October 31, 2016. Lindsey Decl., ¶ 4 & Ex. B. Verizon refused to provide this information. Lindsey Decl., ¶ 5, 6 & Ex. C, D.

The parties met and conferred regarding Verizon’s refusal to produce discovery on data service agreements related to MiFi devices but were unable to reach a resolution. Lindsey Decl., ¶ 2. During this time, as required by the October 25, 2016 Amended Scheduling Order [Dkt. 135], on December 2, 2016, Carucel produced the Expert Report of Patrick F. Kennedy (“Original Report”). Lindsey Decl., ¶ 7, Ex. E. Noting the absence of the above requested discovery, Dr. Kennedy stated that “this report addresses damages specifically related to Novatel. If necessary, I will prepare additional analysis and opinions related to the carrier defendants after the carrier defendants have produced information in response to Plaintiff’s request for production.” Original Report at 2.

1 “Based on documents provided, I have estimated the product and
2 service revenue generated from the carrier defendants.... To date, I
3 have received a total of two documents from the carrier defendants,
4 which is not a sufficient basis to form a damages opinion. Upon
5 receipt of requested documentation from carrier defendants, I plan to
6 update my analysis and to issue an opinion regarding any damages
owed to Carucel from the sale of service contracts for infringing
devices.” Original Report at 55.

7 On December 19th (more than two weeks later), the Court held a
8 telephonic hearing regarding the requested discovery and ordered Verizon to
9 produce discovery related to the data service plans sold with the accused
10 products. Given that Verizon had not produced the discovery before the expert
11 report deadline, the parties submitted a joint stipulation to amend the schedule
12 [Dkt. 151] resulting in the Second Amended Scheduling Order that issued on
13 January 26, 2017, ordering Plaintiff to “serve its supplemental damages expert
14 report opinion on damages regarding Cellco’s sales of accused products together
15 with associated wireless data plan sales by February 2, 2017.” [Dkt. 152.]

16 Verizon produced two spreadsheets disclosing data service revenue,
17 VerizonCellco000000199.xls and VerizonCellco000000221.xls on January 5,
18 2017, followed by an additional spreadsheet VerizonCellco000000622.xls on
19 February 1, 2017. Lindsey Decl., ¶ 2. During the deposition of Verizon’s
20 Director of Business Intelligence on January 26, 2017, Mr. Thomas Benz (“Mr.
21 Benz”) conceded that [REDACTED]

22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

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17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 Benz Dep. Trans. at 160:17-25, 162:17-25, 99:5-24 (*italic emphasis added*)
23 (Lindsey Decl., Ex. F).

24 Consistent with the testimony of Verizon's corporate representative, and as
25 detailed in the Supplemental Report produced on February 3, 2017, this
26 additional discovery shows that the revenue that Verizon derived from MiFi
27 related data service plans [REDACTED]
28 [REDACTED]. Supplemental Report at 13.

Time Period		Source
Units	07/2010 – 05/2015	VerizonCellco000000198.xls
Device Revenues (w/o Discounts)	04/2011 – 05/2015	VerizonCellco000000194.xls
Device Revenues (w/ Discounts)	04/2011 – 05/2015	VerizonCellco000000194.xls
Message and Data Revenues	01/2010 – 05/2015	VerizonCellco000000221.xls

Supplemental Report at 13.

Verizon’s initial production of financial information amounted to one spreadsheet that did not include any service revenue, did not include unit sales and device revenue for the first 23 months of infringement, and did not include unit and sales revenue for the first infringing device, the MiFi 2200, for all periods. With the benefit of Verizon’s newly produced discovery and Rule 30(b)(6) deposition testimony from Thomas Benz (a deposition that occurred on January 26, 2017), Dr. Kennedy was able to provide an opinion regarding damages attributable to Verizon. Carucel produced the Supplemental Report on February 3, 2017. That report applies a comparable license, but that analysis is based on revenue and profits that include the data service plans Dr. Kennedy previously did not have, and without which he could not have completed his supplement.

III. ARGUMENT

A. Sections I-IV of the Supplemental Report Should Not Be Stricken, Because the Supplemental Report Did What Was Permitted by the Court in the Second Amended Scheduling Order and Resulted from Defendants’ Improper Refusal to Produce Discovery

The Second Amended Scheduling Order permitted Carucel to serve a “supplemental damages expert report opining on damages regarding *Cellco’s sales of accused products together with associated wireless data plan sales*” (italics added). Despite the express language of the Second Amended Scheduling

Order, Verizon argues that Carucel ‘sandbagged’ Verizon by opining on a hypothetical negotiation between Carucel and Verizon. Motion at 9. Verizon argues that Dr. Kennedy should have disclosed his “framework” in his Original Report, if Dr. Kennedy wanted to “base damages on a hypothetical negotiation between Carucel and Verizon.” *Id.*

But Dr. Kennedy *did* provide Verizon with clear notice in his Original Report, *repeatedly*. See Original Report, at 2 [Lindsey Decl., Ex. E] (“I will prepare additional analysis and opinions related to the carrier defendants [including Verizon] after the carrier defendants have produced information in response to Plaintiff’s requests for production”), 41 n.148 (service revenue needed to provide opinion about Verizon), 52 n.181 (noting analysis could apply to Verizon if given service revenue), 55 (“Upon receipt of requested documentation from carrier defendants, I plan to update my analysis and to issue an opinion regarding any damages owed to Carucel from the sale of service contracts for infringing devices.”). Dr. Kennedy stated the same at his deposition. Kennedy Dep., at 105 (Lindsey Decl., Ex. F). Verizon has no basis to claim that it lacked notice.

Verizon also cannot complain regarding the supplement when the supplement was required by Verizon’s own decision to withhold financial information from the Court until ordered to produce it after the damages expert report deadline. Verizon knew that [REDACTED] (Benz Dep. Trans. at 160:17-25, 162:17-25, 99:5-24 [Lindsey Decl., Ex. G]), but it refused to produce this discovery until compelled by the Court’s December 19, 2016 discovery order. It only produced this information in January, over a month after Dr. Kennedy’s original report was due. Verizon’s assertions that the withheld discovery would “(at most) slightly nudge the royalty rate under Georgia-Pacific Factor 6” (Motion at 10) are simply incorrect, as can be seen by Dr. Kennedy’s

1 supplemental report, which was supported by the data service revenue.

2 Verizon understates the importance of the financial information it
3 produced after Dr. Kennedy's Original Report. As of the Original Report,
4 Verizon had only produced incomplete device unit sales and device sales revenue
5 beginning over a year after the first infringement (July 2010 versus May 2009).
6 Lindsey Decl., ¶ 2. Verizon produced no sales data for its first infringing device,
7 and the incomplete data produced at the time of the Original Report implied that

8 [REDACTED]
9 [REDACTED] *Id.* Verizon's subsequent production
10 revealed that it makes [REDACTED] from device sales and service per
11 unit sold. *See* Suppl. Kennedy Rpt. Dr. Kennedy's report discusses at length the
12 clear connection between service/data revenues and device sales as reported by
13 Verizon in its SEC filings and communications with the FCC. *Id.*

14 Verizon's supplemental production of financial information dramatically
15 changes Verizon's gains from infringement and the profit from the infringing
16 features of the patents-in-suit. Verizon's actual profitability is an essential
17 consideration in Dr. Kennedy's quantitative and qualitative analysis of the
18 reasonable royalty that would result from a hypothetical negotiation with
19 Verizon. Verizon's profit derived from the patented features is part and parcel of
20 Dr. Kennedy's analysis, including many of the *Georgia-Pacific* factors. A
21 damages expert could not perform a reasonable royalty analysis without this
22 critically important information.

23 Verizon argues that Dr. Kennedy should not have waited until his
24 supplement report to provide "a new damages theory *that could have been*
25 *disclosed in his initial report.*" Motion at 2 and 9 (emphasis added). However,
26 Dr. Kennedy stated in both his original report and deposition that he would
27 provide a report about Verizon but could not until he had the service revenue and
28 profitability. The opinions cited by Defendants are inapplicable because they did

not involve a supplemental expert report made necessary by the opposing party's refusal to produce discovery. *Lindner*, 249 F.R.D. 625, 640 (D. Haw. 2008) (excluding Djou October 2007 and subsequent reports, because "Plaintiff could have conducted the additional field work prior to his original expert disclosure deadline or before the June 2007 rebuttal reports and Plaintiff should have known at that time that such additional field work would be relevant."); *Beller*, 221 F.R.D. 689, 694-695 (D.N.M. 2003) ("This is not a situation where, subsequent to the preparation of the original report, new information was discovered which required that the original report be supplemented because the original opinion was no longer correct"). Here, in contrast, Carucel could not gather the discovery necessary for Dr. Kennedy to provide a damages opinion on Verizon in the Original Report, because **Verizon** refused to produce this discovery.

Verizon also provides no case law in support of the proposition that it is somehow improper for Carucel to submit a damages opinion based on a hypothetical negotiation between Carucel and Verizon. As conceded by Defendants, the Second Amended Scheduling Order specifically permitted Carucel to submit a "supplemental damages expert report opining on damages regarding *Cellco's sales of accused products together with associated wireless data plan sales*" Motion, at 9. Despite this, Verizon argues that Dr. Kennedy's damages opinion should be limited to a hypothetical negotiation between Carucel and Novatel (Motion, at 10), contradicting the Second Amended Scheduling Order. Verizon's approach makes no sense.

Consistent with *Georgia-Pacific* factors, the hypothetical negotiation analysis depends on the specific parties and acts of infringement involved in the negotiation. See *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 868 (Fed. Cir. 2010) ("A 'reasonable royalty' derives from a hypothetical negotiation between *the patentee* and *the infringer* when the infringement began.") (emphasis added); *Integra v. Lifesciences I, Ltd. v. Merck KGaA*, 331 F.3d 860, 869 (Fed. Cir. 2003)

(same). Different infringements require different royalties based on the different hypothetical negotiations that would be applied. *See Applied Med. Res. Corp v. U.S. Surgical Corp.*, 435 F.3d 1356, 1361-62 (Fed. Cir. 2006) (separate infringement “requires a separate evaluation of reasonable royalty damages”); *Dataquill Ltd. v. High Tech Computer Corp.*, 887 F. Supp. 2d 999, 1025 (S.D. Cal. 2014) (same). As a result, consistent with the Second Amended Scheduling Order, and employing a reliable damages methodology, Dr. Kennedy properly considered Verizon’s newly produced discovery within the framework of a hypothetical negotiation between Carucel and Verizon.

Had Verizon properly produced the sought MiFi data service plan discovery, supplementation of the Original Report would have been unnecessary. Verizon cannot realistically be heard to complain now that it was prejudiced by its own refusal to produce discovery until required by the Court. Defendant’s Motion to strike sections I-IV of the Supplemental Report should be denied.

B. Section VI Was a Proper Part of the Supplemental Report

The Supplemental Report was made necessary by Verizon’s refusal to produce the MiFi data service plan discovery until the Court ordered it to do so. After his initial report but before the supplement, Dr. Kennedy was provided with criticism of the approach he would continue to take in the supplemental report. Dr. Kennedy therefore included an evaluation of Dr. McDuff’s analysis in section IV of the Supplemental Report. The purpose of section IV is to address anticipated challenges to Dr. Kennedy’s Supplemental Report.

Verizon’s legal citations are inapposite, as they address the need for an end to supplementations to avoid an endless cycle under Federal Rule of Civil Procedure 26(e) when a court did *not* expressly permit the supplement. *See, e.g., Sandata*, 2007 U.S. Dist. LEXIS 85176, *12 (S.D.N.Y. 2007); *Beller*, 221 F.R.D. 689, 695; *Luke*, 323 Fed. Appx. 496, 499-500 (9th Cir. 2009). In contrast, here Dr. Kennedy had express authorization from this Court to produce the

1 supplement per the Second Amended Scheduling Order. This is not the type of
2 “cascading” reports that go back-and-forth. Instead, it is simply one report that
3 was permitted by this Court’s order and required documentation that Defendants
4 previously had refused to produce.

5 Any professional expert should take into account known criticisms being
6 leveled at his or her methodology in providing an analysis, and that is all Dr.
7 Kennedy did here regarding his supplement. Additionally, there was no
8 prejudice to Defendants, because Defendants had an opportunity under the
9 Second Amended Scheduling Order to depose Dr. Kennedy on all aspects of his
10 supplemental report including his responses to the criticisms regarding his
11 methodology (an opportunity they declined).

12 In preparing his opinion regarding the damages attributable to Verizon
13 pursuant to the Second Amended Scheduling Order, Dr. Kennedy properly took
14 into account the information he had at the time he wrote the report. Nothing less
15 should have been expected of him. Had he failed to take into account known
16 criticisms, Defendants surely would have moved to exclude his report on that
17 basis, or used his failure in cross-examination. Basically, Defendants now
18 complain that Dr. Kennedy did his job fully and competently. Defendant’s
19 Motion to strike sections VI of the Supplemental Report should be denied.

20 **IV. CONCLUSION**

21 For the foregoing reasons, Carucel respectfully requests that Defendant’s
22 Motion to Strike be denied in its entirety.

23 Dated: February 27, 2017

/s/ Robert Harkins

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served this 27th day of February, 2017, with a copy of this document via the Court's EM/ECF system. Any other counsel of record will be served by electronic mail, facsimile and/or first class mail on the same date.

/s/ Robert Harkins
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